

1 THE HON. THOMAS O. RICE

2 John M. Silk, WSBA# 15035
3 Joshua B. Lane, WSBA#42192
4 Wilson Smith Cochran Dickerson
5 901 Fifth Avenue, Suite 1700
6 Seattle, WA 98164
(206)623-4100 telephone
(206)623-9273 facsimile
Attorneys for Defendant

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11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF WASHINGTON

13 HELL YEAH CYCLES, a Washington
14 Limited Liability Company,

15 Plaintiff,

16 vs.

17 OHIO SECURITY INSURANCE
18 COMPANY, a foreign insurer,

19 Defendant.

No. 2:13-cv-00184-TOR

DEFENDANT'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT, OR IN
THE ALTERNATIVE,
DEFENDANT'S MOTION FOR CR
56(D) CONTINUANCE

20 Defendant Ohio Security Insurance Company ("Ohio Security") responds
21 to Plaintiffs' Motion for Partial Summary Judgment ("Motion") as follows:

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DEFENDANT'S OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE, DEFENDANT'S MOTION FOR CR
56(D) CONTINUANCE [2:13-cv-00184-TOR] - 1
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WILSON SMITH COCHRAN DICKERSON
A PROFESSIONAL SERVICE CORPORATION
901 FIFTH AVENUE, SUITE 1700
SEATTLE, WASHINGTON 98164-2050
TELEPHONE: (206) 623-4100 FAX: (206) 623-9273

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I. RELIEF REQUESTED

2 The Court should continue the hearing on Plaintiffs' Motion to allow
3 Ohio Security reasonable time to conduct discovery with regard to Plaintiffs'
4 claims. The purpose of summary judgment is to avoid useless trials, not to
5 deprive a party of its right under the Federal Civil Rules of Procedure to conduct
6 discovery regarding claims against it and to gather the evidence that will show
7 that there are genuine issues of material fact that make the entry of summary
8 judgment inappropriate. Pursuant to Fed R. Civ. P. 56(d), the Court should
9 grant Ohio Security's motion for a continuance for the following reasons:
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- 11
- 12 • Plaintiffs produced incomplete responses to Ohio Security's
13 discovery requests in which Plaintiffs failed to produce evidence of
alleged damages in support of their claims;

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 - 15 • Plaintiffs agreed to produce evidence of alleged damages but have
never done so;

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 - 17 • By failing to produce the evidence of Plaintiffs' alleged damages
before moving for summary judgment, Plaintiffs' Motion is
untimely because Plaintiffs have denied Ohio Security the
opportunity to depose Plaintiffs with regard to this evidence and to
retain experts to rebut this evidence;

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 - 19 • Plaintiffs' untimely Motion has prejudiced Ohio Security's right to
present facts essential to justify Ohio Security's opposition. Ohio
Security is entitled to conduct reasonable discovery, pursuant to
Fed. R. Civ. P. 56(d), before responding to Plaintiffs' untimely
Motion.
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1 As such, Ohio Security respectfully requests that the Court continue Plaintiffs'
2 Motion for at least 180 days to allow Ohio Security the opportunity to engage in
3 necessary discovery.

4 Alternatively, Ohio Security requests the Court deny Plaintiff's Motion.
5 Even without Plaintiff's evidence of damages, there are genuine issues of
6 material fact which bar summary judgment on Plaintiff's claims.

8 **II. BACKGROUND**

9 Plaintiff started a motorcycle parts and apparel business in 2011. Mot. at
10 2. A fire damaged the building in which Plaintiff operated its business on
11 November 28, 2012. *Id.* At the time of the fire, Ohio Security insured Plaintiff
12 under a Business Owners policy. *Id.* Plaintiff's Business Personal Property
13 coverage limits under that policy was \$80,000. *Id.* at 3. After conducting an
14 investigation, Ohio Security paid Plaintiff \$80,000 pursuant to the Plaintiff's
15 Business Personal Property coverage limits under Plaintiff's policy. *Id.* Ohio
16 Security paid Plaintiff an additional \$15,626.79 for rental space and labor costs.
17
Id. at 4.

18 When Plaintiff requested additional payments from Ohio Security for
19 alleged financial losses and related claims, Ohio Security requested evidence of
20 the loss. See Affidavit of Joshua B. Lane in Support of Ohio Security's
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1 Opposition to Summary Judgment (“Lane Affidavit”), ¶ 3. Plaintiff failed to
2 produce the requested evidence. *Id.*

3 After Plaintiff filed its lawsuit for bad faith and related claims, Ohio
4 Security repeated its request for evidence of Plaintiff’s damages. *Id.*, ¶ 4, Ex. 1
5 (Ohio Security’s First Interrogatories and Requests for Production (“Discovery
6 Requests”)). Once again, Plaintiff failed to provide the requested evidence. *Id.*,
7 Ex. 2 (Plaintiff’s Answers to Ohio Security’s Discovery Requests); Ex. 3
8 (October 24, 2013 letter to Plaintiff requesting discovery conference to discuss
9 Plaintiff’s incomplete, vague and/or non-responsive answers to Ohio Security’s
10 Discovery Requests). For example, Interrogatory No. 9 to Ohio Security’s
11 Discovery Requests asks Plaintiff to fully describe (1) the nature of Plaintiff’s
12 injuries and claims; (2) the dollar amount of each claim; and (3) the method of
13 calculating damages. *Id.*, Ex. 1 (Interrogatory No. 9). In response, Plaintiff
14 answered:
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16 Itemized lists of business personal property have previously been
17 provided to Ohio Security on multiple occasions. Plaintiff also has
18 not been compensated for rental of temporary storage space.
19 Plaintiff was delayed in reopening for business due to non-
20 payment or delayed payment by Ohio Security. Plaintiff has not
21 reopened the Service Department of Hell Yeah Cycles because it
22 does not have funds to do so. ***Those damages are ongoing and
not yet calculated.*** Plaintiff has incurred unreimbursed costs in
23 defense of the BAM Self Storage litigation. ***This Answer will be
supplemented.***

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2 *Id.*, Ex. 2 (Answer to Interrogatory No. 9).

3
4 First, Plaintiff concedes that Ohio Security paid the \$80,000 limits of
5 Plaintiff's Business Personal Property coverage prior to the lawsuit, subject to
6 Plaintiff's "itemized lists of business personal property." *See* Plaintiff's
7 Statement of Undisputed Facts in Support of Motion for Summary Judgment
8 ("SOF"), No. 4. Second, Plaintiff concedes that Ohio Security paid \$14,000 for
9 rental of temporary storage space, despite its answer to Interrogatory No. 9.
10 SOF, No. 17. Third, Plaintiff provides no evidence in support of its conclusory
11 statements regarding damages. Fourth, Plaintiff notes that damages have not
12 been calculated, despite Ohio Security's request that Plaintiff calculate the
13 damages. Fifth, and most significantly, Plaintiff promised to supplement this
14 answer. Plaintiff never supplemented this answer. Lane Aff., ¶ 4.
15

16 Similarly, Interrogatory No. 19 asked Plaintiff, among other things, to
17 identify Plaintiff's damages with regard to Plaintiff's allegations of violations of
18 the Consumer Protection Act. *Id.*, ¶ 5, Ex. 1 (Interrogatory No. 19). In its
19 Answer, Plaintiff only states "See claims previously submitted. This answer
20 will be supplemented." *Id.*, Ex. 2 (Answer to Interrogatory No. 19). However,
21 Plaintiff's previously submitted claims do not identify Plaintiff's damages with
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1 regard to Plaintiff's allegations of violations of the Consumer Protection Act.

2 *Id.* And again, Plaintiff promised to supplement this answer but never did. *Id.*

3 Similarly, Requests for Production 27, 29, and 30 all seek production of
4 Defendants' evidence of damages. *Id.*, ¶ 6, Ex. 1. Plaintiff responded that these
5 records would be made available for inspection upon ten days' notice. *Id.*, Ex. 2.

6 During a discovery conference on October 25, 2013, Ohio Security's
7 counsel discussed the necessary production of Plaintiff's evidence of damages,
8 and provided notice that Ohio Security wished to inspect and copy Plaintiff's
9 evidence as soon as possible. *Id.*, ¶ 7. Plaintiff's counsel claimed that Plaintiff
10 possessed the requested evidence of damages, that Plaintiff's counsel did know
11 in what form the evidence existed, but that Plaintiff would either produce the
12 evidence or make it available for inspection. *Id.*, Ex. 4 (October 25, 2013 email
13 from Plaintiff).

14 Having heard nothing further from Plaintiff, Ohio Security followed up
15 with Plaintiff on November 7, 2014, with regard to the status of the production
16 of the missing evidence. *Id.*, ¶ 8, Ex. 4 (November 7, 2013 email to Plaintiff).
17 Plaintiff's counsel responded: "I'm working on it. I think we are waiting for
18 one more item." *Id.*, Ex. 4 (November 7, 2013 email from Plaintiff). Despite
19 Plaintiff's representations, Plaintiff never produced the requested evidence and
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1 never made the evidence available for inspection. *Id.* Instead, while Ohio
2 Security waited for the promised evidence production and/or notice that the
3 record, Plaintiff filed this Motion. *Id.* As a result, Ohio Security has been
4 unable to complete its discovery, retain experts to review Plaintiff's evidence of
5 damages, and to make its own dispositive motions. *Id.*

7 Related to the dearth of evidence damages, this case represents a wealth
8 of genuine issues of material fact. There are genuine issue of material fact as to
9 the scope and existence of Plaintiff's damages pertaining to each of Plaintiff's
10 claims. This fact is highlighted by the facts included within Plaintiff's Motion.
11 See Mot. at 2-7. In this "Background" section, Plaintiff noted which facts are
12 allegedly undisputed, and left the disputed facts without support. For example,
13 Plaintiff notes: "HYC incurred substantial losses in the fire. At the time of the
14 fire, HYC was insured under a Businessowners insurance policy issued by Ohio
15 Security Insurance Company ("OSI"). (SOF 3)." There, Plaintiff concedes that
16 the extent of Plaintiff's losses in the fire remains disputed. Plaintiff's motion
17 further concedes a genuine issue of material fact regarding the limits of
18 Plaintiff's Business Personal Property (Plaintiff claims the limits are \$120,000
19 while the policy states \$80,000). *Id.* at 2 n.1. This scope of Plaintiff's coverage
20 goes to the heart of each of Plaintiff's claims which rely on Plaintiff's theory
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1 that Ohio Security failed to exhaust its policy limits in paying \$80,000 under
2 Plaintiff's Business Personal Property coverage. *See, generally*, Plaintiff's
3 Amended Complaint. Similarly, Plaintiff concedes a genuine issue of material
4 fact regarding whether Ohio Security's adjuster, David Bjorklund,
5 "misrepresented the policy benefits and coverages." *Id.* at 4. Mr. Bjorklund
6 denies misrepresenting the policy benefits and coverages. Lane Aff., Ex. 5
7 (excerpt from deposition transcript of Mr. Bjorklund). Whether or not Ohio
8 Security's adjuster misrepresented the policy benefits or the scope of the
9 coverage is a central issue to Plaintiff's claims of bad faith and violations of the
10 CPA and IFCA.
11

12 Similarly, fire investigators and other witnesses identified that there were
13 up to five businesses occupying the business space used by Plaintiff on the date
14 of loss, but Plaintiff failed to identify these other businesses. *Id.*, ¶ 9, Ex. 3
15 (referencing Interrogatory 5 to Ohio Security's Discovery Requests). Where the
16 evidence produced demonstrates that the owner of Plaintiff (Hell Yeah Cycles)
17 also may have owned some or all of these other businesses, there remains a
18 genuine issues of material fact as to the extent of overlap in the loss of one entity
19 over another, and to what extent Plaintiff's owner attempts to include the
20 damages of these other entities within the alleged damages for Plaintiff.
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1 Plaintiff has refused to identify the scope of the claims made by these other
2 entities. *Id.*, Ex. 3 (referencing Interrogatories 6 and 14 to Ohio Security's
3 Discovery Requests).

4 Finally, Plaintiff has never produced a signed verification page for its
5 Answers to Ohio Security's Discovery Requests. *Id.*, ¶ 10. Plaintiff's failure to
6 produce discovery responses signed by Plaintiff's owner puts all of Plaintiff's
7 responses, such as they are, in doubt. *See* Fed. R. Civ. P. 26(g)(2).

9 **III. ISSUES**

10 1. Should the Court continue the hearing of Plaintiffs' Motion for at
11 least 180 days pursuant to CR 56(d) so that Ohio Security may obtain the
12 responses to its discovery promised by Plaintiffs that raise genuine issues of
13 material fact pertinent to Plaintiff's Motion?

15 Answer: YES.

16 2. Alternatively, should the Court deny Plaintiff's Motion in light of
17 the many genuine issues of material fact remaining in this matter?

19 Answer: YES.

20 **IV. EVIDENCE RELIED UPON**

21 This motion relies on the Court's files and records herein as well as the
22 Affidavit of Joshua B. Lane and Exhibits thereto.

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2 **IV. LEGAL AUTHORITY**
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5 **A. The Court Should Continue Consideration of Plaintiff's Motion**
6 **Pursuant to Rule 56(d).**

7 Ohio Security respectfully requests additional time for discovery so that it
8 may reasonably respond to Plaintiffs' allegations. Under Fed. R. Civ. P. 56(d),
9 the Court may order a continuance or may make such other order as is just when
10 a nonmovant cannot present facts essential to justify its opposition. The court
11 has a duty to accord the parties a reasonable opportunity to make the record
12 complete before ruling on a motion for summary judgment, and a failure to
13 accord the nonmoving party a reasonable opportunity to show the existence of
14 an issue of material fact constitutes an abuse of discretion. *Rand v. Rowland*,
15 154 F.3d 952, 958 (9th Cir. 1998) (citing to Rule 56(f)).

16 Plaintiffs seek to deny Ohio Security *any* opportunity to show the
17 existence of an issue of material fact with regard to Plaintiff's damages. In
18 doing so, they seek to have the court commit a *per se* abuse of discretion. *Id.*
19 Without conducting any discovery, Ohio Security cannot meaningfully respond
20 to Plaintiffs' pending Motion. Plaintiffs seek an order confirming as a matter of
21 law that which only a jury may decide: whether Plaintiff suffered damages in
22 excess of Plaintiff's insurance policy limits and whether Ohio Security's
23 handling of Plaintiff's claims, with respect to those damages, constituted a
breach of contract, bad faith, and/or a violation of the CPA and IFCA. By
assuring Ohio Security that Plaintiff would supplement its discovery responses,

1 produce evidence of Plaintiff's damages, and make evidence available for
2 inspection, and then moving for summary judgment before doing so, Plaintiff
3 has denied Ohio Security a reasonable opportunity to show the existence of
4 several genuine issues of material fact.

5 Ohio Security's settlement offers were not unreasonable when made.
6 Plaintiffs not only assume that which they must prove, but they wish to deprive
7 Ohio Security of any chance to investigate their claim. Plaintiffs, once again,
8 are placing the cart before the horse.

9 Plaintiffs will not be prejudiced if their Motion is continued by at least
10 180 days. Plaintiffs agreed to produce the requested evidence and agreed to
11 inform Ohio Security when the evidence would otherwise be available for
12 inspection. By permitting Ohio Security the opportunity to review Plaintiff's
13 evidence, Plaintiff will be satisfying its commitments already made to Ohio
14 Security without having to do more. Ohio Security has not had an opportunity
15 to conduct discovery due to the timing of Plaintiffs' Motion and its previous
16 commitments to Ohio Security; the Court should grant Ohio Security's request
17 to review Plaintiff's withheld evidence which directly pertains to Plaintiff's
18 summary judgment claims.

19 **B. Alternatively, the Court Should Deny Plaintiff's Motion**

20 Even if the Court does not grant Ohio Security's request for additional
21 time to obtain the promised evidence of damages from Plaintiff, the Court
22 should deny Plaintiff's Motion. To prevail on summary judgment "on CPA or
23 non-CPA bad-faith claims, [Plaintiff] must show there is no question of fact as

1 to (1) whether it violated any subsection of WAC 284-30-330; or (2) whether
2 such violation caused a recognized injury.” *Am. Mfrs. Mut. Ins. v. Osborn*, 104
3 Wn. App. 686, 698, 17 P.3d 1229 (2001).

4 Moreover, the CPA has been construed to require *causation* between the
5 alleged wrongful act and damages (to business or property) suffered by the
6 Plaintiff. *See Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App.
7 553 (1992) (CPA violation requires “the existence of a causal link between the
8 deceptive act and the injury suffered”); *Lidstrand v. Silvercrest Indus.*, 28 Wn.
9 App. 359, 368 (1981) (recovery under the CPA requires “a causal relation
10 between the practice engaged in by the defendant and the damages suffered by
11 the plaintiff”). *See also Blaney v. International Association of Machinists and*
12 *Aerospace Workers District No. 160*, 151 Wn.2d 203, 216 (2004) (Actual
13 damages are damages “that are proximately caused by the wrongful action,
14 resulting directly from the violation of RCW 49.60”).

15 Moreover, even if Plaintiff could find a technical violation of WAC 284-
16 30-330(9) (or any other subsection of this regulation), such a violation, standing
17 alone, would not be adequate to establish liability for bad faith by an insurer or a
18 violation of the CPA. *Capelouto v. Valley Froge Ins. Co.*, 98 Wn. App. 7, 990
19 P.2d 414 (1999); *Ins. Co of Pennsylvania v. Highland Ins. Co*, *supra*.

20 Rather, to establish the existence of bad faith, Plaintiff must present
21 evidence that Defendant’s conduct was unreasonable, frivolous, or unfounded.
22 *Smith v. SAFECO Insurance Company*, 150 Wn.2d 478, 78 P.3d 1274 (2003);
23 *American States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 78 P.3d

1 1266 (2003); *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2001).
2 The burden of establishing that Ohio Casualty's conduct was unreasonable,
3 frivolous or unfounded is on the Plaintiff. *Smith*, 150 Wn.2d at 486 (emphasis
4 added)(internal citations omitted).

5 As long as the insurance company acts with honesty, bases its decision on
6 adequate information, and does not overemphasize its own interests, an insured
7 is not entitled to base a bad faith or consumer protection claim against its insurer
8 on the basis of a good faith mistake. *Coventry Assoc. v. American States Ins.*
9 *Co.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998).

10 In this case, there are questions of fact as to whether Ohio Security's
11 violated subsection of WAC 284-30-330, as to whether these violations were
12 unreasonable, and as to whether Ohio Security's actions proximately caused a
13 recognized injury to Plaintiff's business or property.

14 There are multiple disputed issues of material fact, based in part on the
15 facts noted above, i.e., Plaintiff's failure to substantiate its damages. As a
16 central part of settling Plaintiff's claims, Ohio Security investigated Plaintiff's
17 loss and requested evidence to support the Plaintiff's alleged damages, which
18 Plaintiff has still failed to produce or to make available for inspection.

19 Plaintiff's Motion alleges that there is no issue of material fact as to
20 whether Ohio Security breached WAC 284-30-330(9) by issuing payments to
21 Plaintiff unaccompanied by statements setting forth the coverage under which
22 payment was made. This argument ignores the fact that Ohio Security paid
23 \$80,000 under Plaintiff's Business Personal Property coverage (the policy limit).

1 Plaintiff concedes that it disputes whether \$80,000 is the limit under Plaintiff's
2 Business Personal Property coverage, and Plaintiff's argument presumes that the
3 policy limit was \$120,000 and that Ohio Security should have paid \$120,000,
4 not \$80,000. However, where Ohio Security paid the entire \$80,000 available
5 under Plaintiff's Business Personal Property coverage, there is genuine issue of
6 material fact as to whether Ohio Security acted unreasonably or breached WAC
7 284-30-330(9). Similarly, Plaintiff alleges that adjuster David Bjorklund
8 misrepresented the insurance policy provisions, in violation of WAC 284-30-
9 350. This argument relies expressly on the extent of Plaintiff's damages to
10 Plaintiff's tools, employee wages, personal effects, and computer equipment.
11 Mot. at 9 and 10. As previously noted, Ohio Security disputes the scope and
12 extent of these alleged damages, and Plaintiff has failed to produce and or make
13 available for inspection the evidence of these claimed damages. Furthermore,
14 Mr. Bjorklund denies any intentional misrepresentations and/or unfair and
15 deceptive acts. Lane Aff., Ex. 5. These are genuine issues of material fact as to
16 this claim.

17 Plaintiff alleges Ohio Security breached WAC 284-30-330 (subsections 6,
18 12, 13, and 16) by not attempting in good faith to effectuate prompt, fair, and
19 equitable settlement of Plaintiff's claims. This claim goes back to Ohio
20 Security's first efforts at obtaining evidence of Plaintiff's damages and
21 Plaintiff's failure to make such evidence available, a failure that continues to
22 this day. Whether Ohio Security failed to act in good faith where Plaintiff failed

1 and or refused to provide the requested evidence constitutes a genuine issue of
2 material fact as to this claim.

3 Similarly, Plaintiff alleges Ohio Security violated the CPA by, among
4 other things, failing to promptly and fairly settle Plaintiff's claims. But again,
5 Ohio Security has been ham-strung by Plaintiff's failure to provide the requested
6 evidence of Plaintiff's damages. Any delay on behalf of Ohio Security to settle
7 Plaintiff's claims is the result of Plaintiff's refusal to provide evidence of
8 Plaintiff's damages. Whether Ohio Security breached the CPA despite paying
9 more than \$95,000 to Plaintiff and while still waiting for Plaintiff to produce
10 evidence of Plaintiff's damages constitutes a genuine issue of material fact as to
11 this claim.

12 Similarly, Plaintiff claims there is no issue of material fact as to its claim
13 that Ohio Security acted in bad faith. But Plaintiff concedes that an insurer does
14 not act in bad faith where it acts honestly, bases its decision on adequate
15 information, and does not overemphasize its own interest. Mot. at 13 (citing
16 *Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wn. App. 804, 808, 120 P.3d 593
17 (2005), rev. denied, 157 Wn.2d 1004 (2006)). Here, there is an issue of material
18 fact as to whether Ohio Security acted honestly and did not overemphasize its
19 own interest based on the information Plaintiff made available to it. In other
20 words, Ohio Security claims that without the evidence of damages that Plaintiff
21 withheld from it, it acted honestly and did not overemphasize its own interests
22 by paying Plaintiff more than \$95,000. There is therefore an issue of material
23 fact as to whether Ohio Security acted in bad faith.

Finally, Plaintiff claims Ohio Security denied Plaintiff benefits that Ohio Security “owed” to Plaintiff, and therefore violated IFCA. But there is a genuine issue of material fact as to whether Ohio Security “owed” Plaintiff benefits beyond those which Ohio Security already paid, where Plaintiff has withheld and failed to produce evidence of its damages.

6 For these reasons, Ohio Security respectfully requests the Court deny
7 Plaintiff's Motion.

VI. CONCLUSION

9 Ohio Security requests that the Court grant it an opportunity to obtain the
10 evidence of damages that Plaintiffs have promised to produce. By moving for
11 summary judgment before producing its evidence of damages, Plaintiff has
12 prejudiced Ohio Security by denying Ohio Security the opportunity to determine
13 the extent of Plaintiff's claims or evaluate whether Plaintiff is entitled to
14 additional amounts under the insurance policy. Ohio Security respectfully
15
16 requests additional time to obtain the promised evidence from Plaintiff.

17 Alternatively, Ohio Security requests the Court deny Plaintiff's Motion.
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19 Even without Plaintiff's evidence of damages, there are genuine issues of
material fact which bar summary judgment on Plaintiff's claims.

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2 **VII. PROPOSED ORDER**
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5 A proposed form of Order is filed herewith.
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8 DATED this 3rd day of February, 2014.
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11 *s/ Joshua B. Lane*
12 John M. Silk, WSBA No. 15035
13 Joshua B. Lane, WSBA No. 42192
14 WILSON SMITH COCHRAN DICKERSON
15 Of Attorneys for Ohio Security Insurance Company
16 901 Fifth Avenue, Suite 1700
17 Seattle, WA 98164
18 Ph: (206) 623-4100 / Fax: (206) 623-9273
19 silk@wscd.com
20 lane@wscd.com
21
22
23

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CERTIFICATE OF SERVICE

2 I certify that on the 3rd day of February, 2014, I electronically filed the
3 foregoing with the Clerk of the Court using the CM/ECF System, which will
4 send notification of such filing to all attorneys for record, including the
following:

5 Brian S. Sheldon bsheldon@spokelaw.com

7 *s/ Joshua B. Lane*
8 Joshua B. Lane